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IN THE

Supreme Court of the United States

October Term, 1955

No. 346

CAPITAL TRANSIT COMPANY, Inc., *Petitioner*

v.

NETTIE E. PORTER, CLYDE ERNEST PORTER, Guardian, *Respondents*

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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No. 246

CAPITAL TRANSIT COMPANY, INC., *Petitioner*

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NETTIE E. FOSTER, CLURE EDDIE FOSTER, GENEVA CURRY, *Respondents*

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 88-90) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the refusing of a motion for new trial is a matter resting in the sound discretion of the trial judge.

2. Whether a motion for judgment n.o.v. should be granted where there are controverted material issues of fact for the jury.

STATEMENT

On June 28, 1952 respondents sued petitioner in the U. S. District Court for the District of Columbia, based on the negligent operation of petitioner's bus. Nettie E. Foster and Geneva Curry sued for damages as a result of personal injuries; Clure Foster, Sr. sued for loss of his wife's consortium.

Subsequent to respondents and petitioner resting their respective cases, a motion for a directed verdict was made by petitioner which was denied and judgments against the petitioner were returned by the jury on November 5, 1954.

The petitioner thereafter filed a motion for judgment n.o.v. or for a new trial. (R. 11)

The petitioner stated his ground for the motion judgment n.o.v. was "that upon the record as a whole there is no substantial evidence to support the verdicts." The petitioner's alternative motion for a new trial was on the one ground "that the verdicts were against the weight of the evidence". The petitioner in its points and authorities relative to the new trial motion stated:

> "3. The New Trial Motion
>
> The alternative motion for a new trial is made purely as a precautionary measure to make certain that at least this minimum relief is granted to defendant. The relief would not really be adequate as it would subject defendant to the expense of further defense in a case where the fully developed facts reveal that plaintiffs have no case except for sympathy.

That the verdicts were against the weight of the evidence and therefore, a new trial is in order is plain from the review of the evidence contained in 2, supra. Indeed, the court frankly stated in the discussion over sending the case to the jury that the evidence preponderated in favor of the defendant.

The fact that the jury allowed itself to be swayed by sympathy for the injured plaintiffs or bias against a public utility certainly does not alter the fact that the weight of the evidence was neither with the plaintiffs, nor even in equilibrium, but actually was overwhelmingly in favor of the defendant. The duty of the trial court under such circumstances is clear. A judicial consideration of the evidence must check the jury's palpable error in this case."

After a complete hearing in open Court, the petitioner's motion for judgment n.o.v. and for New Trial was denied. The following Memorandum was entered by the Court:

"The court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

The order of the trial court denying the petitioner's motion for judgment n.o.v. or for a new trial states:

"Upon the coming on for hearing of the motions filed herein by the defendant for a new trial and for judgment N.O.V., it is this 6th day of December, 1954, ordered that said motion be, and the same are hereby overruled."

Petitioner thereafter noted an appeal and the U. S. Court of Appeals for the District of Columbia Circuit determined that petitioner's appeal was primarily without merit and otherwise found no error affecting substantial rights. On Petition for Rehearing En Banc and Modification of the Judgment of the Court of Appeals, same was denied, Per Curiam.

Respondent, Nettie E. Foster, on January 22, 1951 was driving home in the right hand lane of a highway, about a

foot from the curb, when petitioner's bus, travelling in the same direction, passed on her left. The bus swerved in front of her, pulled toward the curb, and stopped so abruptly that she was unable to avoid a collision. The bus was at an angle to the curb when it was struck. The front end near the curb and the right rear end 4 feet from the curb. (R. 18, 20, 45, 46, 70)

There was no one sitting in the front seat beside Mrs. Foster. Respondent Geneva Curry, grandmother of Nettie E. Foster, was sitting in back of the driver; Jerome Foster, age ~~12~~ 6, was sitting in the middle of the back seat and Clure Foster, Jr., ~~an infant child~~ AGE 12 was on the other side of the back seat. (R. 33)

The collision occurred about 6:30 a.m., on Kenilworth Avenue and Jay Street, N. E., Washington, D. C. The bus was destined for Kenilworth and, running at 15 MPH would take only 3 minutes to arrive there. The scheduled time of arrival for the bus at Kenilworth was 6:45 a.m. (R. 75, 79)

The bus driver, operating an empty bus, on a street devoid of traffic except for the bus and the Foster car, admitted he came to a sudden stop for the purpose of picking up a prospective passenger named Bishop; that he did not see Bishop until he was 5 or 6 feet from him (R. 76) or about even with him (R. 72, 73) and that he stopped to pick Bishop up about 15 to 20 feet beyond the bus stop (R. 76). He also testified that he was "travelling in the right hand lane over near the curb." (R. 73, 74)

Bishop, a 70-year-old man, testified that the bus stopped suddenly at the bus stop sign, or before the bus stop sign, and referring to the collision, "When he hit I was on the sidewalk." (R. 64, 67)

Testimony of the two police investigators supported Mrs. Foster's testimony that the bus cut into her path by showing that, at the moment of the impact, the bus was at an angle pointing toward the curb, its front end about a

foot away and its right rear end about 4 feet away from the curb; and that only the right rear end of the bus and left front fender of the automobile were damaged.

Mrs. Foster's testimony, together with other evidence, showed that the bus did cut in front of her path and stopped abruptly and she had no opportunity to avoid striking it. She testified the petitioner's bus, travelling in the same direction passed her on her left hand side, pulled over suddenly in front of her, and came to a sudden stop, cutting her off so suddenly there was no time for her to avoid striking the rear of the bus. That the bus was at an angle to the curb when it was struck. The angle of the bus to the curb was corroborated by measurements made by two police investigators and their testimony relative to the physical damage sustained by the motor vehicle and motor bus is also shown by plaintiff's exhibits 5 through 7 and 9 through 16. (Originals filed with this Court). (R. 39, 45, 47)

As to the bus driver's story that he was "travelling in the right lane over near the curb" such testimony was unbelievable and as the Court of Appeals states (R. 90):

> "As a result, the jury could have properly disregarded the bus driver's story that he was 'travelling in the right hand lane over near the curb.' This, in turn, may have affected the credibility of the rest of his testimony."

By reason of the collision, Mrs. Foster sustained the following injuries:

> Brain concussion, fractured skull, torn face and knees, fear of loss of an eye, three broken ribs, accompanied with heavy bleeding.

And she testified that she was rendered unconscious by the collision and that she did not make any statement at the scene of the collision or at the hospital (R. 22, 28). Relative a contention asserted by petitioner at trial that a

statement was made by her on the scene of the collision or at the hospital the Court of Appeals in its opinion of May 26, 1955 states (R. 90):

> "Moreover, there was evidence from which the jury could have found that Mrs. Foster was unconscious or only semi-conscious immediately after the accident. Hence, the jury could have rejected or attributed little weight to the evidence concerning her alleged statement made at that time."

ARGUMENT

I.

A Motion for a New Trial Is Directed to the Discretion of the Trial Court

The motion for a new trial involves the discretion of the trial Court and an order granting or denying a new trial is not reviewable except for clear abuse of discretion, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, and that Court's action is not reviewable upon appeal, save in the most exceptional circumstances, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 253.

There is no question that the petitioner, after the jury verdicts, vigorously and capably presented his motion for judgment n.o.v. or for a new trial to the trial Court. The remarks of the Court made during trial were fully set forth in petitioner's motion for a new trial and were considered and the Court exercising its discretion denied both motions.

In the instant case the motion for new trial was predicated upon the sole ground "that the verdicts were against the weight of the evidence."

The trial Court denied the motion for new trial in the following order:

> "Upon the coming on for hearing of the motions filed herein by the defendant for a new trial and for judgment N.O.V., it is this 6th day of December, 1954,

ordered that said motion be and the same are hereby denied."

The petitioner endeavors to obfuscate this matter by referring to the trial Court's memorandum which states:

> "The court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

The Court's memorandum in effect says, that in so far as the motion for n.o.v. is concerned there is substantial evidence to support the verdict of the jury and that the Motion for Judgment n.o.v. and for a new trial are overruled.

First, it is obvious from the record that the order is controlling and in view of only one ground being advanced by petitioner for a new trial it would be futile to require other than a simple denial of the motion for new trial as it properly appears in the Court's order.

Second, it is wholly a gratuitous assumption on the part of the petitioner as to what standards the court applied to the motion. The order denying same need not state any reasons for said denial particularly when only one ground, "that verdicts were against the weight of the evidence" is advanced. This is clearly indicated in *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 248, which states:

> "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review."

Third, Federal Rule of Civil Proceduce 52(a) states in part:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or *any other motion* except as provided in Rule 41(b)."

This rule clearly states that findings of fact and conclusions of law are unnecessary and not required on the petitioner's motions and in *Shilling* v. *Schwitzer-Cummings Co.*, 79 U.S. App. D.C. 20, 142 F. (2d) 82, it has been held that even in cases where findings are necessary, they should be short and not necessarily set forth all propositions contended by the contestants.

Fourth, that this court's ruling in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, which states that a trial judge should indicate the grounds of his decision on a motion for a new trial applies only when a new trial is granted or perhaps, when several grounds are advanced for a new trial. Certainly it would be a futile gesture to require a trial judge to state at length reasons for denying a new trial when only one ground is advanced.

Fifth, petitioner contends on page 19 of his brief, relative motion for new trials that, "The problem is a constantly recurring one and yet one which is often difficult to present on appeal because trial judges despite this court's admonition to indicate grounds of their rulings, frequently are not specific during this phase of the trial." It appears that the petitioner now contends that every motion for a new trial should be by an order indicating grounds of the court's ruling. The petitioner did not assert this contention to the trial Court subsequent to its order denying the motion for new trial and further such contention was not presented to the Court of Appeals and is not properly to be considered as a basis for granting certiorari.

Sixth, the U.S. Court of Appeals for the District of Columbia Circuit, relative these contentions of the petitioner, determined that " . . . we find no error affecting substantial rights" (R. 90). Even if such decision was considered erroneous or unwise, that court has long been accorded, as a matter of policy by this Court, the right and duty to declare the local law of the District of

Columbia as if it were the highest court of a state, *Griffin* v. *United States*, 336 U.S. 704, 717.

II.

There Is No Conflict of Decisions

Petitioner asserts that there is confusion in the Fifth and Sixth Circuits in distinction between "the weight of the evidence" and "substantial evidence to support the verdict." Petitioner cites *Firestone Tire & Rubber Co.* v. *Nollman*, 107 F. (2d) 176 (5th Cir. 1939). The Court of Appeals in affirming the District Court did not discuss the question

> "whether the District Court erred in denying appellant's motion for a directed verdict at the close of the evidence, and in the alternative for judgment non-obstante veredicto, or a new trial" but said simply, "We find substantial evidence in the record tending to support the verdict."

This does not show a confusion over the distinction between the several motions.

Next cited by petitioner is *Orient Insurance Co.* v. *Parkhill*, 170 F. (2d) 510 (5th Cir. 1948). The statement of "substantial evidence" commented on by petitioner was made by the Court of Appeals in disposing of the contention of appellant that the "plaintiff filed a sworn statement of loss before the trial which was false and fraudulent, and made with intent to deceive defendant." The Court said "There was substantial evidence to support the finding of the jury that the sworn statements which were made by the assured were not made with intent to deceive. The trial court, therefore, properly refused to disturb the verdict in this regard."

Next cited by petitioner is *Werthan Bag Corp.* v. *Agnew*, 202 F. (2d) 119 (6th Cir. 1953). In this case *only* a motion for a new trial was made and errors claimed related to the damages awarded. The Court after discussing in detail

the evidence supporting the size of the verdict affirmed with the conclusion,

> "From a consideration of these items, it is apparent that there was substantial evidence to support a verdict of $42,500 as compensation for the injuries caused appellee in consequence of the negligence of the appellant company."

No confusion existed as to the offices of the motions for judgment N.O.V. and for a new trial as only a motion for new trial was made.

The distinction between the lack of substantial evidence required for granting of a motion N.O.V. and the "clear weight of the evidence" required on motion for new trial is discussed and followed in the following cases and there is no conflict between the 5th and 6th Circuit Court of Appeals and other circuits.

6TH CIRCUIT

General American Life Insurance Co. v. *Central Nat. Bank of Cleveland*, 136 F. (2d) 821 (6th Cir. 1943), citing *Montgomery Ward & Co.* v. *Duncan*, Supra.

5TH CIRCUIT

Marsh v. *Illinois Cent. R. Co.*, 175 F. (2d) 498 (5th Cir. 1949), citing *Montgomery Ward & Co.* v. *Duncan*, Supra.

Pennsylvania Thresherman & Farmer's Mut. Cas. Ins. Co. v. *Crapet*, 199 Fed. (2d) 850 (5th Cir. 1952), citing *Montgomery Ward & Co.* v. *Duncan*, Supra.

Foreman v. *Texas & New Orleans R. Co.*, 205 F. (2d) 79 (5th Cir. 1952).

The petitioner in its motion for a new trial raised only the one ground that the verdict was against the weight of the evidence and certainly a denial of that contention does not show a failure to exercise discretion or a failure to

use the correct legal standard in exercising it. *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474.

Petitioner in his brief (page 18) contends that "It is certain that the proper exercise of this discretion would have resulted in a new trial since the trial court unequivocally stated that (R. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

The recital of the Court's statement is (1) taken out of context; (2) was of no significance having been made by the Court prior to the completion of the respective cases; (3) that the Trial Court, after the respective cases were concluded denied the petitioner's motion for a directed verdict; (4) that in the pleadings and hearing of the petitioner's motion for a new trial, the Trial Court's comments were fully presented, considered, and the motion for a new trial was properly overruled.

The facts surrounding the above incident in the Trial Court are as follows. Counsel for the respective parties approached the bench regarding placing into evidence interrogatories pertaining to the bus schedule (Tr. 236). The Court ruled on said matter and asked if the parties had any prayers. Counsel for petitioner then facetiously remarked that he had a prayer for a directed verdict. The exact proceeding follows:

> "The Court: Have you any prayers?
> Mr. Roberson: I have a prayer for a directed verdict.
> The Court: *I'm afraid I will have to overrule you.*
> Mr. Roberson: I think your Honor ought to hear me.
> The Court: *It will have to be good.* I think the evidence certainly preponderates, in my opinion, in your favor. Let's go ahead and listen to what you have to say." (Tr. 239).

The petitioner thereupon rested his case and respondents proceeded with further proof and finally rested their case

(Tr. 241) and thereafter petitioner's motion for a directed verdict was heard at length (Tr. 241, 242, 243) and it was denied. After jury verdicts and judgments, the petitioner again vigorously argued for a Judgment N.O.V. or for a new trial. The remarks of the Court were fully set forth in the petitioner's motion for a new trial and were considered and the motion was denied.

III.

The Record as a Whole Shows Substantial Evidence of Petitioner's Negligence and the Decision Below Is Clearly Correct

Relative petitioner's shot gun approach to a matter involving the sanctity of jury verdicts claiming "no substantial evidence to support the verdicts." This appears to be an invitation for this Court to try the case de novo. The Trial Court's ruling on this matter was "The court is of the opinion that there is substantial evidence . . ." The U.S. Court of Appeals for the District of Columbia Circuit ruling on this matter was "The judgments are attacked primarily on the ground that there was insufficient probative evidence to take the case to the jury. We find this attack without merit." (R. 88)

This case turns solely upon an analysis of the particular facts involved, and it was for the jury to resolve all conflicts in the evidence and pass upon the credibility of the witnesses and the weight to be given their testimony. Certainly the evidence adduced issues to be determined by the jury, *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29.

The petitioner's motor bus was carelessly and negligently operated and cut in front of the motor vehicle operated by Mrs. Foster. The speed of the vehicles in the collision, the weight to be accorded testimony of witnesses, deductions to be made from sustained physical damage and photographs, etc., all present problems for the resolution of the jury.

The facts have been heretofore presented and the record has been sent to this Court by respondents and in brevity the respondents stand on the record as a whole and the enunciated opinions of this Court in its aversion to judicial invasion of the jury box, *Galloway* v. *United States*, 319 U.S. 372; *Gunning* v. *Cooley*, 281 U.S. 89.

This Court has frequently reiterated the principles of substantial evidence in the following decisions:

> "It is well settled that, where there is an uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." *Richmond & Danville R. Co.* v. *Powers*, 149 U.S. 43, 37 L. Ed. 64.

> "Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury." *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L. Ed. 610.

> "The very essence of its (i.e., jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . Courts are not free to reweigh evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35, 88 L. Ed. 520.

The substantial evidence rule in the District of Columbia is set forth in *B. & O. R. Co.* v. *Postom*, 85 U.S. App. D.C. 207, 177 F. (2d) 53.

The contentions of the petitioner in all respects fails to show the decisions of the jury, the Trial Court, and the

Court of Appeals as being incorrect in any manner; further, there is no showing of any important question of federal law in this simple case.

CONCLUSION

The decision below stating that the attacks on the judgments are without merit and that there is no error affecting substantial rights, is correct, and represents a matter of pure local law for the District of Columbia.

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August 12, 1955